

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA12-438

RICKY JOHNSON, JR.

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered SEPTEMBER 26, 2012

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
WESTERN DISTRICT
[NO. JV2009-449]HONORABLE BARBARA HALSEY,
JUDGE

AFFIRMED

CLIFF HOOFFMAN, Judge

Appellant Ricky Johnson, Jr., appeals from the order of the Craighead County Circuit Court terminating his parental rights to his putative daughter, M.J. On appeal, Johnson argues that the termination order should be reversed and dismissed because he was not the legal father of M.J. and thus had no parental rights to be terminated. We affirm.

This case began on December 4, 2009, when the Arkansas Department of Human Services (DHS) exercised emergency custody of M.J. and her sister, B.O., due to several reports of environmental neglect. The children's mother was deceased at that time, and they were living with Johnson. The girls had severe cases of head lice and were dirty, there was little food in the home, and Johnson admitted to using drugs. In its petition for emergency custody, DHS alleged that Johnson was the legal and putative father of M.J. and that Charles

Oker was the legal and putative father of B.O.¹ The trial court granted emergency custody to DHS on December 8, 2009.

An adjudication hearing was held on February 22, 2010, at which time the children were adjudicated dependent-neglected based on Johnson's admitted drug use and environmental neglect. The goal of the case was set as reunification between Johnson and M.J., and the trial court ordered that services be provided to Johnson. Johnson was ordered to view the "The Clock is Ticking" video; submit to random drug screens; submit to a drug and alcohol assessment and follow its recommendations; submit to a psychological assessment and follow its recommendations; complete parenting classes; maintain stable housing and employment; and pass drug screens prior to visitation with the children. The adjudication order noted that Johnson had passed two drug screens but tested positive for methamphetamine in January 2010. In a July 2010 review order, Johnson was also ordered to establish paternity.

The permanency-planning hearing was held in December 2010, and the goal of the case was changed to termination of parental rights. The trial court found that Johnson had not been complying with the case plan or court orders, noting that he did not have a stable home or employment and that he had not completed parenting classes or a psychological evaluation. The court stated that Johnson had completed inpatient drug rehabilitation, but noted that he was currently incarcerated at the time of the hearing.

DHS filed a petition for termination in April 2011, which was later amended in

¹B.O. is not involved in this appeal.

November 2011. DHS also filed an amended petition for emergency custody and dependency-neglect in November 2011, alleging that Johnson was the putative father of M.J. but that Oker was the legal father of both children. An adjudication order was entered as to Oker, and the court found that Oker was the legal father of both children because he had been married to the children's mother at the time of their births, although he was not present when the children were removed. In the amended petition to terminate, DHS alleged as grounds for termination that M.J. had lived outside the home for twelve months and that Johnson had willfully failed to provide significant material support or to maintain meaningful contact; that M.J. had been adjudicated dependent-neglected and had continued out of Johnson's custody for more than twelve months, and despite a meaningful effort by DHS to rehabilitate him, Johnson had not remedied the conditions causing removal; that Johnson had abandoned M.J.; and that, subsequent to the filing of the original dependency-neglect petition, other factors or issues arose that demonstrated that return of the juvenile to Johnson was contrary to her health, safety, or welfare, and that, despite the offer of appropriate family services, Johnson had manifested the incapacity or indifference to remedy those subsequent issues or factors.

At the termination hearing in January 2012, the foster care supervisor with DHS, Terri Blanchard, testified that Johnson had been very hostile and uncooperative at the beginning of the case. Blanchard stated that Johnson finally entered drug treatment in July 2010 and began complying with the case plan; however, he was then incarcerated from November 2010 until September 2011 in Missouri. She testified that he had not seen M.J.

since October 2010 and that he was currently living with his sister, who had her own child removed from her custody for a period of time. According to Blanchard, in the two years that the case had been open, Johnson had not made measurable progress toward rectifying the reasons for removal, he had not shown a genuine, sustainable investment in complying with the case plan, goals, and court orders, and there would be potential harm to M.J.'s health and safety if she were returned to Johnson's custody. Blanchard also stated that Johnson had never had DNA testing performed to prove that he was the father despite the court's order to establish paternity. Although she testified that M.J. had some behavioral issues and that this would be a potential barrier to her adoption, Blanchard felt that the child was adoptable given her recent progress in her current placement.

In his testimony, Johnson stated that he was the father of M.J., that he loved her, and that he was in the process of getting his life "back straight." He requested that the court not terminate his parental rights and stated that he was currently in welding school, that he had completed another drug-rehabilitation program while incarcerated, and that he had been clean for ten months. Johnson testified that he was only living with his sister until he was employed and able to afford his own residence. He claimed that he had not watched the "The Clock is Ticking" video or completed parenting classes because DHS would not return his calls and that he did not complete the mental evaluation because he had the date wrong and was unable to reschedule. Johnson claimed that he never took a paternity test because the child-support office would not do it without a court order. When M.J. was born, Johnson stated that he did not seek a DNA test because there was no question that she was

his daughter. He testified that M.J. lived with him until she was removed from his custody and that he was responsible for her food, shelter, and clothing during that time.

At the conclusion of the hearing, the trial court found that DHS had proved by clear and convincing evidence each of the grounds for termination alleged in its petition. The court also found that termination of Johnson's parental rights was in M.J.'s best interest after specifically considering the likelihood of adoption and the potential harm if she were returned to his custody. The court noted that Johnson loved his daughter and that Johnson was "off to a good start" in going to welding school and having completed drug treatment. However, the court found that M.J. had waited long enough and that, even if he were otherwise in full compliance with the case plan, the child could not be returned to Johnson at that time due to his lack of a stable home. The termination order was entered on March 8, 2012, and Johnson timely appealed from this order.

In an appeal from an order terminating parental rights, the appellate court will not reverse the trial court's ruling unless its findings are clearly erroneous. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

In this appeal, Johnson does not challenge the sufficiency of the evidence supporting the grounds for termination or the trial court's finding that termination was in M.J.'s best interest. Thus, these issues have been waived by him. *Burkhalter v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 520. Instead, he contends that the termination order should be

reversed and dismissed because he was not the legal father of M.J. and therefore had no parental rights to be terminated. We are unable to address the merits of his argument, however, because he has raised this issue for the first time on appeal.

Throughout the case, as well as during his testimony at the termination hearing, Johnson continually asserted that he was M.J.'s biological father and requested that custody of his daughter be returned to him. At no time did he raise the precise issue that he now raises on appeal, which is that the trial court was not authorized to terminate his parental rights as M.J.'s putative father where another man, Oker, had been named as her legal father due to Oker's marriage to M.J.'s mother. As Johnson asserts in his brief, the trial court was fully aware that Johnson had not had his paternity established, as this point was made by Johnson during his extensive directed-verdict motions and was also recognized by the trial court in its oral ruling at the conclusion of the hearing. However, the issue was raised by Johnson, and addressed by the trial court, only with regard to whether sufficient evidence supported one of the alleged grounds for termination, which was that Johnson had failed to support or maintain contact with M.J. during the more than twelve-month period that she had remained out of the home. Johnson did not argue that the trial court should have dismissed the termination petition, as he does on appeal, based on the fact that he had only been determined to be the putative, not legal, father.² Because the trial court was not apprised

²Although we are unable to reach the merits of Johnson's argument due to the preservation issue, we note that, as DHS contends in its brief, the termination statute specifically provides that a putative parent shall receive notice of the termination proceeding and further states that "[i]f no legal rights have been established, a putative parent must prove that significant contacts existed with the juvenile in order for the putative parent's rights to

of this particular contention, there was consequently no ruling by the trial court on this issue.

The failure to raise issues or to obtain rulings at the trial court level is fatal to this court's consideration of the issue on appeal. *Burkhalter, supra*. A defendant may not wait until the outcome of the case to bring an error to the trial court's attention, and furthermore, parties may not change the grounds for an argument on appeal but are bound by the scope and nature of the arguments presented at trial. *Id.* Therefore, Johnson's argument is not preserved for appeal, and we affirm the termination of his parental rights.

Affirmed.

ABRAMSON and BROWN, JJ., agree.

Deborah R. Sallings, Arkansas Public Defender Commission, for appellant.

Tabitha B. McNulty, Office of Chief Counsel, for appellee.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for minor child.

attach.” Ark. Code Ann. § 9-27-341(c)(2)(A)(ii) (Supp. 2011). DHS asserts that it is clear from Johnson's testimony at the hearing that significant contacts existed with M.J., as he stated that he had raised her from birth until she was removed from his custody, and DHS thus contends that his rights as a putative parent had attached and were subject to being terminated by the trial court.